Filed 6/15/09 Hansen v. St. Jude Medical Center CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PATRICIA A. HANSEN, Plaintiff and Appellant, v. ST. JUDE MEDICAL CENTER et al., Defendants and Respondents.	G038731 (cons. with G039790) (Super. Ct. No. 05CC12722) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed.

Barry A. Bisson for Plaintiff and Appellant.

Foley & Lardner and Christopher G. Ward for Defendants and Respondents.

* * *

Patricia Hansen appeals from the judgment dismissing her action against St. Jude Medical Center and its employees, Ard Roshan and Joanne Bono, after the trial court sustained the defendants' demurrers to her third amended complaint without leave to amend. She claims she adequately pleaded causes of action for breach of employment contract, tortious discharge, defamation, retaliation in violation of public policy, and fraud. She also claims if the demurrers were properly sustained, she should be given leave to amend. We find the third amended complaint fails to state a cause of action and Hansen has not demonstrated she can cure its defects. Accordingly, we affirm the judgment.

FACTS

We summarize the confusing and sometimes disconnected allegations of Hansen's third amended complaint. She alleges that St. Jude hired her "as a Clinical Laboratory Scientist, Lead Tech, on a per diem basis. However, she worked full time (about 40 hours per week) for almost two years." Subsequently, her status changed to a "benefited employee," and she "was no longer an at-will employee but was recognized as a staff employee." Hansen alleges "this was an express Employment Contract" in which she "agreed to be employed and do what was requested of her and St. Jude agreed to treat plaintiff fairly in the same manner as other similar employees were treated." Hansen "substantially performed her job duties"; St. Jude's "practice" was "to discharge . . . staff employees only for good cause."

Hansen alleges in January 2004 she was wrongfully suspended for three days, "which ultimately included a 4th day," and removed as Lead Tech for taking one hour for lunch rather than a half hour. She alleges this suspension was discriminatory "because a one hour lunch break was customary for her fellow employees, none of whom were suspended or disciplined for such action." She was also suspended for 60 days without cause on December 5, 2004, and subsequently terminated from employment on

December 29, 2004. She alleges that St. Jude breached its promise to treat her fairly as a full-time employee.

Hansen alleges that she was suspended for four days in January 2004 because she "reported 'Ard' Roshan and Joanne Bono to Human Resources for unsafe acts. They retaliated by intentionally causing a wrongful termination of plaintiff and other damages . . . ." She then alleges St. Jude's management "failed to treat [her] fairly by intentionally and wrongfully terminating [her] employment on grounds that they knew or should have known were false."

Hansen alleges that Ard Roshan and Joanne Bono, employees of St. Jude, "stated to the St. Jude Human Relations Representative, that there was no computer glitch and that employee Sandi Bowerman had given Ard a memo stating there was no computer glitch." On December 29, 2004, when Hansen asked Bowerman in front of the human relations representative "if [Bowerman] said there was no computer glitch," Bowerman "denied making that statement." Roshan and Bono knew their statement that there was no computer glitch to the human relations representative was false. "When [Hansen] asked Ard and the Chemistry Supervisor about the defective computer glitch, Ard refused to warn [Hansen] or to train her about the troponin deletion. . . . There was no training, no explanation, no follow-up, or accountability, but to continue letting technologists make the computer error while the supervisor and her manager were aware of and could have been able to correct the deletion."

Hansen alleges Roshan and Bono retaliated against her by causing her suspension and termination "due to her reporting them to Human Resources for an error which would delay patient care because it deleted the troponin result necessary for proper diagnosis and treatment . . . ." These acts of retaliation were "fraudulent and false" and "could have caused damage to patients." Her act of reporting Roshan and Bono to human resources was protected because their failure to correct the computer problem "could

have caused harm to at least one of the patients being treated at St. Jude at that time. . . . The statutes and constitution of California require that such actions which can harm the public, be corrected immediately."

Hansen alleges that St. Jude had a duty to train employees how to enter "critical high troponin values. When the on line value for troponin was critical high the appended comment, warning the doctor of the critical value and of its reference ranges, was too long for the space allowed by the analyzer, so the computer would delete the technologist's on line troponin result. The appended comment would mask the on line result which was deleted, and no numerical value would be visible to the doctor. When a pending log was pulled, the deleted value should have been on the pending list, but because of the appended comment, the troponin results appeared to have come to completion. The chemistry supervisor of St. Jude management should have been promptly notified of this problem. The chemistry supervisor failed to properly train, warn about, or correct the computer glitch. The doctors and nurses were so fed up about the delayed critical troponin results, that they made a formal complaint to Human Resources regarding the Chemistry Department at St. Jude for its continual failure in delaying the critical high troponin values on patient reports."

Hansen alleges that St. Jude, Roshan, and Bono defrauded her by intentionally and negligently misrepresenting to the human relations department that Bowerman had given Roshan a memo stating there was no computer glitch. The truth was that Roshan had no such memo, and Bowerman denied sending such a memo or making an oral statement stating there was no computer glitch. Hansen alleges that Bowerman said there was a computer glitch. This misrepresentation caused Hansen's termination.

Hansen alleges that Roshan and the human relations representative "understood that the computer glitch was related to the report by Ms. Hansen . . . ."

When Roshan told the human relations representative that Bowerman "had made no representation about a computer glitch," both he and the human relations representative "reasonably understood that the statement meant that Ms. Hansen had made a serious mistake, which was false."

St. Jude's demurrer to the third amended complaint was heard in April 2007. The trial court sustained the demurrer without leave to amend, stating, "If you've got a case, you should be able to do it in this many iterations of that pleading . . . ." Roshan and Bono demurred to the third amended complaint in November 2007,[1] and the trial court again sustained the demurrer without leave to amend. The trial court stated, "[F]rom the start in this case . . . , I couldn't make hide nor hair of what you were trying to allege, and it hasn't gotten much better. [¶] I still find your pleadings unintelligible almost and rambling and incoherent . . . and I advised you to talk to one of your colleagues who specializes in this kind of work because it's not rocket science to plead a cause of action, but you haven't done it here. [¶] I've given you so many times to amend. This will not go on forever. You're costing people money. You're costing the taxpayers money, and you haven't got it right." The judgment of dismissal was entered in February 2008.

DISCUSSION

Hansen contends she has properly pleaded a cause of action for breach of an express or implied employment contract against St. Jude. She also contends she has properly pleaded causes of action for the employment torts of wrongful discharge in violation of public policy, defamation, and fraud against St. Jude, Roshan, and Bono.

---

[1] Roshan and Bono were not served with the first three versions of the complaint. After service of the third amended complaint, Hansen obtained defaults against them, which were later set aside.

"'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]' [Citations.]" (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396.) We find Hansen's pleading to be woefully inadequate.

Breach of Employment Contract

Employment for an unspecified term is presumed to be at-will, i.e., it "may be terminated at the will of either party on notice to the other." (Lab. Code, § 2922.) Thus, an employer presumptively "may terminate its employees at will, for any or no reason. A fortiori, the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment. Because the employment relationship is 'fundamentally contractual' [citation], limitations on these employer prerogatives are a matter of the parties' specific agreement, express or implied in fact. The mere existence of an employment relationship affords no expectation, protectable by law, that employment will continue, or will end only on certain conditions, unless the parties have actually adopted such terms." (*Guz v. Bechtel Nat., Inc.* (2000) 24 Cal.4th 317, 350.)

An employer and employee may agree to limit the employer's at-will termination rights in any lawful manner. (*Guz v. Bechtel Nat., Inc.*, *supra*, 24 Cal.4th at p. 336.) "The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations." (*Ibid.*) Hansen contends she has alleged either an express or

implied agreement by St. Jude that she was not to be discharged except for good cause and that she was to be treated fairly like other similar employees.

Hansen alleges no specific facts to support either an express or implied contract. She does not allege whether the alleged express agreement was written or oral, what the terms of the agreement were, or even that St. Jude expressly promised not to discharge her except for good cause or to treat her fairly like similar employees. Neither does Hansen allege any conduct by St. Jude that would evidence its intent to make these promises.

When determining whether an implied in fact contract exists, the trier of fact looks at several factors: "(1) the personnel policies and practices of the employer, (2) the employee's longevity of service, (3) actions or communications by the employer reflecting assurances of continued employment, and (4) practices in the industry." (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 366.) In conclusory fashion, Hansen alleges St. Jude's practice was to terminate staff employees only for good cause. Even if true, that fact alone merely evidences good employer practice, not St. Jude's intent to limit its power to terminate at will. "Otherwise, an employer would be forced purposely to terminate employees for any and every infraction – or none at all – in order to maintain the presumption of at-will employment. The law does not require such caprice to avoid creating an implied in fact contract." (*Id.* at p. 367.)

Hansen does not clearly allege how long she was employed by St. Jude as a staff employee, but even if we infer several years of employment, that factor alone cannot support the allegation of St. Jude's implied promise to change her at-will status. (*Davis v. Consolidated Freightways*, *supra*, 29 Cal.App.4th at p. 367.) And Hansen does not allege that St. Jude did or said anything to suggest a promise of continued employment or that an industry practice would support such an implied promise.

Termination in Violation of Public Policy

Although an employer has the right to terminate an at-will employee for an arbitrary or irrational reason, "there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094.) To state a cause of action for a termination in violation of public policy, the employee must allege an employer-employee relationship (*Miklosy v. Regents of Universityy of California* (2008) 44 Cal.4th 876, 900) and a violation of a substantial, fundamental, well-established policy that benefits the public at large (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256; *Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at p. 1090; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 668-670).

Hansen alleges she was terminated in retaliation for reporting Roshan and Bono to management for failing to correct a computer problem that could harm the patients. Although she vaguely refers to California's statutes and constitution, she fails to identify what public policy was violated. Such vague allegations "unaccompanied by citations to specific statutory or constitutional provisions, puts [the defendant] and the court in the position of having to guess at the nature of the public policies involved, if any." (*Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1257.) Hansen's pleading is insufficient.

Furthermore, Hansen cannot plead a cause of action for wrongful termination in violation of public policy against Roshan and Bono because they were not her employers. Individual employees "cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which an *employer* commits that tort." (*Miklosy v. Regents of the University of California*, *supra*, 44 Cal.4th at p. 900.)

Defamation

A cause of action for defamation requires allegations of a false, nonprivileged statement of fact which "[t]ends directly to injure [the plaintiff] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits . . . ." (Civ. Code, § 46, subd. (3).) Hansen contends she has alleged a cause of action for defamation by alleging that she told human resources about the existence of a computer glitch, her statement was corroborated by a memo from a fellow employee, and Roshan and Bono contradicted her, implying she had made "a serious mistake." Again, the pleading is insufficient.

The alleged communications by Roshan and Bono to the human relations representative were between St. Jude employees related to a problem with the reporting practices of the chemistry department. These communications fall squarely within the statutory privilege for communications made without malice between interested persons. (Civ. Code, § 47, subd. (c); *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846-847.) Hansen does not allege that Roshan and Bono acted with malice.

Fraud

Fraud is the intentional misrepresentation of fact made with the intent to induce the plaintiff to rely on it to the plaintiff's detriment. (Civ. Code, § 1709.) Hansen alleges that Roshan and Bono made an intentionally false statement about the computer glitch, but there is no allegation they intended her to rely on the statement or that she did so.

Denial of Leave to Amend

We review a trial court's decision to deny leave to amend a complaint after a successful demurrer for an abuse of discretion. If the plaintiff shows there is a reasonable possibility that the defect can be cured by amendment, we will find such an abuse. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Hansen had four chances to plead her causes of action. She made no showing that a fifth chance would yield a different result. The trial court did not abuse its discretion by denying her another chance to amend.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.